NO. 87-33

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In the Supreme Court of the United States

OCTOBER TERM, 1987

IN THE MATTER OF
WIEDEMANN & FRANSEN, A.P.L.C.
Petitioner

VERSUS

HOLLYWOOD MARINE, INC.
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WIEDEMANN & FRANSEN

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QUESTIONS PRESENTED FOR REVIEW

Whether the United States Court of Appeals, Fifth Circuit erred in upholding the trial court's finding dismissing petitioner's claim, and more particularly whether the Court of Appeals erred in holding that petitioner's claim was not entitled to be measured by a Federal standard pursuant to Maritime Law.

LIST OF INTERESTED PERSONS

Counsel for petitioner, Wiedemann & Fransen, A.P.L.C., certifies that the following listed parties have an interest in the outcome of this case. This representation is made pursuant to Rule 21.1(b) of the Rules of the Supreme Court of the United States:

1) Wiedemann & Fransen, A.P.L.C.

2) Hollywood Marine, Inc.

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REPORTS OF OPINIONS DELIVERED IN COURTS BELOW

The Opinion of the United States Court of Appeals, Fifth Circuit, in this matter has been published in the West Reporter System as *Wiedemann & Fransen, A.P.L.C. v. Hollywood Marine, Inc.*, 811 F.2d 864.

STATEMENT OF JURISDICTION

The jurisdiction of this Court arises under 28 U.S.C. Section 1254, and the basis on which this Petition is predicated is Rule 17.1(a) of the Rules of the Supreme Court of the United States. Petitioner's claim was originally dismissed by the Honorable Martin L.C. Feldman, District Judge for the United States District Court for the Eastern District of Louisiana on February 20, 1986. The decision of His Honor below was upheld by a three-member panel of the United States Court of Appeals for the Fifth Circuit on February 23, 1987. Petitioner's Request for Rehearing En Banc was denied on March 27, 1987.

STATEMENT OF STATUTES INVOLVED

This matter involves the interpretation of the following statutes or jurisprudence:

A) 46 U.S.C.A. Section 688, more commonly referred to as the Jones Act;

B) The General Maritime Law

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below.

The Complaint of Wiedemann & Fransen, A.P.L.C., petitioner, was filed on December 11, 1985 in the United States District Court for the Eastern District of Louisiana. On January 7, 1986, Hollywood Marine, Inc., respondent, filed a Motion to Dismiss the Complaint for failure to state a cause of action. The Motion was submitted on brief, without oral argument, by order of the Lower Court on February 19, 1986. On February 20, 1986, Honorable Martin L.C. Feldman, Judge of the United States District Court, Eastern District of Louisiana, rendered judgment dismissing petitioner's Complaint. The judgment was thereafter entered on February 27, 1986.

Petitioner made timely application for appeal, and on February 23, 1987, the United States Court of Appeals for the Fifth Circuit, by a three-member panel, rendered its opinion upholding the decision of His Honor below and dismissing petitioner's claim. Petitioner applied for Rehearing En Banc which was denied on March 27, 1987.

B. Statement of the Facts

SUMMARY

Randy Lee Neely, a seaman pursuant to 46 U.S.C.A. Section 688, more commonly referred to as the Jones Act, was injured aboard the M/V CREOLE JANICE, a vessel owned by his employer, Hollywood Marine, on May 8, 1985.

On May 13, 1985, Randy Lee Neely entered into a contingent fee employment contract with petitioner, Wiedemann & Fransen, A.P.L.C., a professional law corporation domiciled in the Parish of Orleans, State of Louisiana, to represent him in his claim against Hollywood Marine for personal injuries sustained aboard the vessel. By the terms of the contract, Neely agreed not to personally settle his claim or suit with Hollywood Marine, and to permit all negotiations for settlement or suit to be handled by petitioner.

On June 13, 1985, petitioner filed a Jones Act and General Maritime suit against Hollywood Marine and Tenneco Oil Company in the Civil District Court, Parish of Orleans, State of Louisiana, under the Judiciary Act of 1789, 28 U.S.C. Section 133, more commonly referred to as the "Saving to Suitors' Clause". Issue was thereafter joined in the proceeding and petitioner filed a Motion to Fix the Matter for Trial on the Merits.

On November 14 and 15, 1985, Randy Lee Neely, without representation, met with representatives of the Claims Department of Hollywood Marine in Houston, Texas, and entered into an agreement to settle all claims asserted in his behalf for the sum of $50,000.00. (Petitioner notes that plaintiff's first request for full and final settlement was for the provision by Hollywood Marine of a new automobile). The settlement documents were executed in Houston, Texas on November 22, 1985.

A representative of Hollywood Marine prepared a letter of discharge of petitioner for execution by Randy Lee Neely in Houston, Texas on November 15, 1985.

Hollywood Marine was represented in the State Court suit in New Orleans at the time of the settlement by the Law Firm of Terriberry, Carroll & Yancey, and

Hollywood Marine was aware that Randy Lee Neely, was represented by petitioner.

Hollywood Marine was further aware that Randy Lee Neely was under psychiatric care at the time of the settlement and that he was scheduled for at least two additional surgical procedures in the near future. Hollywood Marine further knew that Randy Lee Neely had a permanent hearing deficit, permanent paralysis of the face, and was incapable of returning to work in the capacity of a seaman at the time of his settlement.

THE PERTINENT FACTS

Hollywood Marine induced Randy Lee Neely to go to Houston, Texas, without representation, on November 14 and 15, 1985, and while in Houston, Texas, intentionally induced him to discharge petitioner and enter into a settlement agreement on November 22, 1985.

The induced discharge of petitioner was with full knowledge of the existence of the contractual relationship between Randy Lee Neely and petitioner, and was intentionally done in order to accomplish the ulterior motive of Hollywood Marine, which could not have been accomplished without the cancellation of the contractual agreement between Randy Lee Neely and petitioner.

ARGUMENT

THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN UPHOLDING THE TRIAL COURT'S ACTION DISMISSING PETITIONER'S CLAIM

Seaman are recognized as wards of the Federal Court in all matters in any way associated with their maritime-related activities, and are traditionally brought under the

cloak and protection of federal law pursuant to 46 U.S.C. Section 688, the Jones Act and the General Maritime Law. Petitioner asserts that transactions involving seaman that are directly related to their maritime activity should naturally flow under the cloak and protection of federal law as well.

In *Greenberg v. Panama Transport Company,* 185 F.Supp. 320 (D. Mass. 1960), reversed on other grounds 290 F.2d 125 (1st Cir. 1961), Judge Wyzanski of the Massachusetts District Bench was presented with an almost identical factual situation as that presented by petitioner herein. The injured seaman had entered into a contingent fee contract with the attorney therein and the defendant induced the client to discharge the attorney and settle with the defendant. Judge Wyzanski, after a trial on the merits, rendered judgment in favor of the discharged attorney and against defendant in the amount of the prospective fee that the attorney would have earned, but for defendant's induced breach of the contract. The Court or Appeals reversed and dismissed the case due to lack of jurisdictional amount under its diversity jurisdiction, but made no comment on the findings of Judge Wyzanski relative to the applicability of maritime law to the breach of the contingency contract.

Judge Wyzanski, in concluding that federal law was applicable, determined that federal law as opposed to state law was applicable in this contingency fee claim. To conclude otherwise, in Judge Wyzanski's words, "would seem highly artificial". Supra at p.324.

Judge Wyanski noted as follows:

> Every policy consideration dictates that the Federal courts should enunciate uniform national rules to determine the validity of contracts made

by proctors in admiralty, who are officers of federal courts. That is, there should be 'a uniform national rule of law, binding on state and federal courts alike where the operative legal policies are federal in origin.' Paul A. Freund, Federal—State Regulations In The Opinions of Judge Magruder, 72 Harv. L. Rev. 1204, 1213.

Having determined that the retainer contract is governed by federal law, and that under such law the contract is valid, the Court must next consider what law governs a claim that defendants have tortiously interfered with the contract. It is usually assumed that in connection with the tort of interfering with advantageous contract relations, as a connection with torts generally, the governing rule is supplied by the law of the place where the tort occurs. *Hendler v. Cuneo Eastern Press, Inc.*, 2 Cir. 279 F.2d 181. Restatement, Conflicts Sections 378, 384. But the grounds of logic, history, convenience, and policy which support this doctrine in many cases, particularly cases of physical injury, are not appropriately invoked in every type of case. Different torts may be governed by different principles of conflict of laws. Cf. *Gordon v. Parker*, D.C.D. Mass., 83 Supp. 40, affirmed sub nom. *Parker v. Gordon*, 1 Cir. 178 F.2d 888. See A. A. Ehrenzweig, Alienation of Affections In the Conflict of Laws, 45 Cornell Law Qu. 514, 515. And the conflict of laws rules governing even the particular tort of interference with advantageous contractual relations may depend upon what type of contract relationship is said to have been impeded.

Here we have a claim that when sued in a federal court defendants interfered with the contractual relationship between the then plaintiff who was suing them as his attorney, the present plaintiff.

> In determining the applicable law to decide this claim, it does not seem of the greatest importance where the interference occured. Nor does it seem of decisive importance in what forum the claim of alleged interference is made. The controlling principles of substantive law should be enunciated on a national basis applicable to anyone who is said to have interfered with a professional relation between an officer of a national court and his client. Cf. *O'Brien v. Western Union Tel. Co.*, 1 Cir., 113 F.2d 539. See Freund, op. cit.
>
> The federal courts being free to apply a national rather than a state standard to claims that defendants have interfered with relations between federal lawyers and their clients, the federal courts would probably mould the national standard with appropriate references to Restatement, Torts Sections 766-774. Drawing upon those sections as well as the general case law this Court concludes that in the case at bar defendants, without a privilege so to do, have induced Vazquez not to continue his professional relations with Greenberg and are therefore liable to Greenberg for the damages thereby caused to Greenberg." *Greenberg* at p.324-325.

Petitioner suggests that the reasoning of *Greenberg*, supra, should have been adopted and applied in this matter. If Neely, the injured seaman herein, was suing in Federal Court to set aside an onerous contingent fee contract, petitioners assert that the Court would rightfully, without hesitation, apply a federal standard under the auspices of the general maritime law and the Jones Act. There is no sound reason to apply state law to a maritime-connected contract. The natural consequences will be a lack of uniformity.

The three-member panel of the Fifth Circuit concluded that petitioner's Complaint fell short of the requisite proof of a maritime tort under the "locality"test of *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 248, 93 S.Ct. 493, 34 L.E. 2d 454 (1972), as the alleged injury, the breach of the contingency fee contract, did not occur on navigable waters. Petitioner does not take exception with the Court's conclusion that the tortious interference with petitioner's employment contract occurred on land. Petitioner does however take exception to the Court's utilization of the land-based acts as a test for jurisdiction in this "derivative"action.

The subject matter of the contract was the representation of a seaman in an unquestionable maritime action. The breach of the contract was precipitated by the tortfeasors desire to effectuate an extremely advantageous settlement of the maritime action with the seaman, without the benefit of representation of counsel.

Federal courts have long recognized federal standards in maritime-related causes of action, such as that of a seaman's wife for loss of consortium, services and society, as "derivative"causes of action. See *Carollo v. Global Cape and Corp.,* 627 F.Supp. 1507(D. Mass. 1986). It has never been suggested that the wife's injuries occurring solely on land do not meet the "locality" test of *Executive Jet,* supra. The "locality" test in "derivative" actions is measured by the place of occurrence of the "primary" action, not the "derivative" action.

Federal courts have also recognized the seaman's maritime cause of action for retaliatory firing. Obviously, the tort of retailiatory firing most frequently occurs on land, but as it is a "derivative"action, the "primary" tort is the one evaluated in order to determine the presence, or

absence, of the requisites of the *Executive Jet* "locality" rule. See *Smith v. Atlas Offshore Boat Service, Inc.*, 653 F.2d 1057 (5th Cir. 1981).

In addition, Federal courts have further recognized the original tort-feasors responsibility for the land based tortious conduct of a physician treating a seaman for the effects of a maritime injury. The physician tort, occurring solely on land, judged in isolation, could not meet the "locality" test of *Executive Jet*, supra, but it survives as a "*derivative*" action arising out of the "primary" maritime tort. See *Parker v. Gulf City Fisheries, Inc.*, 803 F.2d 828 (5th Cir. 1986), and *Fitzgerald v. A.L. Burbank & Co.*, 451 F.2d 670 (2nd Cir. 1971).

It is respectfully submitted that petitioner's action is a "derivative" action and the maritime nature vel non under the *Executive Jet* "locality" test should be determined by the "primary" tort which precipitated the contract involving petitioner, and in this respect, the three-judge panel erred in dismissing petitioner's claim by utilization of the locality test.

Judge Wyzanski, in his opinion in *Greenberg*, supra, argued fervently for the application of a federal standard as opposed to a state standard for the contingency fee controversy. That need continues and is again made evident by the situation in which petitioner now finds itself. Louisiana is the only state that does not recognize a cause of action for tortious interference with contract. Accordingly, Louisiana is the only state, according to the decision of the United States Court of Appeals for the Fifth Circuit, wherein a maritime tort-feasor can intentionally interfere with a contract between a seaman and a maritime lawyer, and not be held responsible in damages. Accordingly, any tort-feasor may bring a seaman represented by counsel to Louisiana and deal with that seaman, without the presence

of his counsel and with immunity from liability. Open season has been declared by the Federal Fifth Circuit on maritime lawyers throughout this country pursuant to its decision.

The fact that petitioner's action is a "derivative" maritime action heralds the need for a national standard in this proceeding. See *O'Brien v. Western Union Telegraph Company,* 113 F.2d 539 (lst Cir. 1940); *Greenberg v. Panama Transport Company,* 185 F. Supp. 320 (D. Mass. 1960); Paul A Freund, Federal-State Relations in the Opinions of Judge McGruder, 72 Harvard Law Review 1204, 1213.

A seaman in Massachusetts should receive the same treatment and protection in the Federal Judicial System as a seaman in Louisiana. An attorney for a seaman in Louisiana should receive the same treatment and protection under the Federal Judicial System as an attorney for a seaman in Massachusetts.

Petitioner respectfully urges this Court to grant a Writ of Certiorari directed to the United States Court of Appeals for the Fifth Circuit in order to review the necessity of a federal standard for the damages sustained by petitioner.

Respectfully submitted,

WIEDEMANN & FRANSEN

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been served on Rufus C. Harris, III of the Law Firm of Terriberry, Carroll & Yancey, on Thursday, June 25, 1987.

LAWRENCE D. WIEDEMANN

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
Feb. 26, 1986

WIEDEMANN & FRANSEN, A.P.L.C.	CIVIL ACTION
VERSUS	NO. 85-5673
HOLLYWOOD MARINE, INC.	SECTION "F"

JUDGMENT

For the written reasons of the Court on file herein, accordingly;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, Hollywood Marine, Inc., and against plaintiff, Wiedemann & Fransen, A.P.L.C., dismissing plaintiff's suit.

New Orleans, Louisiana, this 25th day of February, 1986.

/s/ Martin L. C. Feldman
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY
FEB 27, 1986

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
Feb. 21, 1986

WIEDEMANN & FRANSEN, A.P.L.C.	CIVIL ACTION
VERSUS	NO. 85-5673
HOLLYWOOD MARINE, INC.	SECTION "F"

ORDER AND REASONS

Before the Court is a Motion to Dismiss plaintiffs' cause of action on the ground that Louisiana law does not recognize a claim for tortious interference with contractual rights.

Plaintiffs are a law firm who contend that the defendant wrongfully interfered with their contract rights to represent one who, in spite of the fee employment contract with the law firm, nevertheless settled his claim with defendant without the knowledge or consent of the law firm and allegedly in violation of his contract with the firm. The defendant's Motion to Dismiss is GRANTED. Louisiana does not permit such a claim.

Although recognition by Louisiana courts of a claim for damages for tortious interference with contractual rights might well be high on plaintiffs' wish list, this Court will not speculate as to what Louisiana courts might do in the future; further, this Court will not determine for Louisiana courts whether or not they ought to change their views on the subject. Finally, this Court in unimpressed that Louisiana might be the only State remaining which does not recognize such a cause of action. The fact is that Louisiana courts have consistently held that a claim for

damages for tortious interference with contractual rights is not recognized under Louisiana law and this Court will not create one where none exists.[1] *P.P.G. Industries, Inc. v. Bean Dredging, et al*, 447 So.2d 1059 (La. 1984); *Templeton v. interstate Electric Co., et al*, 37 So.2d 809 (La. 1948); *Cust v. Item Co.*, 8 So.2d 361 (La. 1942). See *Eximco v. Trane Company*, 737 F.2d 505 (5th Cir. 1985).

New Orleans, Louisiana, this **20th** day of February, 1986.

/s/ Martin L. C. Feldman

MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY
FEB 24, 1986

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[1] Although the argument is made that Louisiana law does not apply but, rather, either Texas or general maritime law applies it is clear that only Louisiana law applies under both a conflicts of law analysis or a "false conflicts" analysis. See *Brinkley & West, Inc. v. Foremost Insurance Co.*, 499 F.2d 928 (5 Cir. 1974); *Ardoyno v. Kyzar*, 426 F.Supp. 78 (E.D. La. 1976).

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-3199

WIEDEMANN & FRANSEN, A.P.L.C.,
Plaintiff-Appellant,

v.

HOLLYWOOD MARINE, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

(February 23, 1987)

Before BROWN, RANDALL and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

The plaintiffs below, Wiedemann and Fransen, A.P.L.C., appeal from the order of the district court dismissing their suit. We affirm.

I.

On May 8, 1985, Randy L. Neely was injured aboard the M/V CREOLE JANICE, a vessel owned by his employer, Hollywood Marine. Thereafter, Neely retained the law firm of Wiedemann & Fransen, the appellants, to represent him in his claim against Hollywood Marine for personal injuries sustained aboard the vessel. Neely entered into a contingent fee contract with the appellants

in which Neely agreed not to personally settle his claim or suit with Hollywood Marine.

In June of 1985, the appellants filed a Jones Act and general maritime suit in Louisiana state court against Hollywood Marine on behalf of Neely. Later, without being represented by counsel, Neely met in Texas with members of Hollywood Marine's claim department, and agreed to settle all his claims for $50,000. Apparently satisfied with this arrangement, Neely discharged the appellants. In December of 1985, the appellants filed this suit invoking diversity jurisdiction and claiming that Hollywood Marine had tortiously interfered with appellants' contract of employment with Neely. Hollywood Marine moved to dismiss appellants' complaint under Rule 12(b)(6), Fed. R. Civ. P., asserting that Louisiana would not recognize a cause of action for tortious interference with contractual relations. The district court dismissed, and Wiedemann & Fransen appealed.

II.

The appellants direct several arguments against the district court's dismissal of their complaint. In reviewing the district court's action, this court can affirm only if no relief could be granted under any set of facts that could be proved consistent with the appellants' allegations. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). With this standard of review in mind, we turn to the questions presented.

III.

Passing the fact that the suit was brought under the court's diversity jurisdiction and that admiralty jurisdiction was not invoked, appellants first argue that a contingent fee agreement between an injured seaman and his attorney is a maritime contract and that tortious in

interference with such a contract is a maritime tort. Assuming, without deciding, that appellants' agreement with Neely was a maritime contract, we do not agree that Hollywood Marine's settlement with Neely amounted to a maritime tort against appellants.

We have recently had occasion to consider the question whether an alleged tort is a maritime tort. In *May v. Transworld Drilling Co.*, 786 F.2d 1261, 1265 (5th Cir. 1986), we said:

> The test to determine the existence of a cause of action in maritime tort is identical with that applied to determine jurisdiction in admiralty. The Supreme Court, in *Foremost Insurance Company v. Richardson*, [457 U.S. 668, 673 (1983)] held that, as indicated in *Executive Jet*, [409 U.S. 249, 268 (1972)] it is requisite to proof of a maritime tort that there be an injury on navigable waters (the traditional "locality" test) and, in addition, that the alleged wrong bear a significant relationship to traditional maritime activity.

(footnotes omitted) We conclude that this case does not satisfy the first part of this test and consequently need not consider the second part.

In applying the first part of the *Executive Jet* test, this court must look to "where the alleged [wrong] took effect," rather than to the locus of the allegedly tortious conduct. *Executive Jet Avaiation, Inc. v. City of Cleveland*, 409 U.S. 248, 266 (1972). In the instant case, the alleged tort took effect in Louisiana where the appellants were performing their contract with Neely by bringing suit against Hollywood Marine. We cannot see how any impact of the alleged tort could have been felt on the navigable waters.

Consequently, the alleged tort is not a maritime tort.[1]

IV.

Appellants assert that, if maritime law does not apply in this instance, we should apply the substantive law of Texas, the situs of the tort, in resolving this case. In this diversity action, we must apply Louisiana rules in determining what substantive law to apply to this case. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). The Louisiana Supreme Court has abandoned the *lex loci delicti* doctrine and has instead adopted the interest analysis approach to resolving choice of law questions. *Jagers v. Royal Indem. Co.*, 276 So.2d 309, 312 (La. 1983). Although part of the alleged wrong occurred in Texas, the appellants as well as Neely are residents of Louisiana. The services to be performed by appellants were to be performed in Louisiana, i.e., the lawsuit which was the subject of appellants' contract with Neely was filed in Louisiana state court. We conclude that under these circumstances, Louisiana courts would apply the laws of Louisiana in resolving this dispute.

V.

Although Louisiana thusfar has not recognized a cause of action for tortious interference with contractual

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[1] In *Carroll v. Protection Maritime Ins. Co.*, the First Circuit noted that a tort may be maritime if its effects are felt on navigable waters. 512 F.2d 4, 8 (1st Cir. 1975). *Carroll* applied admiralty jurisdiction to an action asserted by a seaman and commercial fishermen against maritime protection and indemnity insurers claiming that the insurers interfered with the plaintiffs' employment contracts with their respective employers. *Id.* at 5. The plaintiffs complained that the defendants provided the plaintiffs' employers with a list of employees who in the past had filed personal-injury actions against their employers. *Id.* As a result, several of the plaintiffs were either terminated or refused employment, *Id.* The court decided that the "impact of the defendants' alleged actions" was felt at sea. *Id.* at 8.

relations, appellants argue that the Louisiana Supreme Court has intimated that it might reconsider its position on this cause of action, and that we should therefore certify this question to the Louisiana Supreme Court. We have recently declined to certify this question to that court, and do so now. *Baton Rouge Bldg. & Constr. Trades Council v. Jacobs Constructors, Inc.*, 804 F.2d 879, 884 (5th Cir. 1986).

VI.

For the foregoing reasons, the judgment of the district court is AFFIRMED.